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Opinion on transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTOINE DION RATCLIFFE, Defendant and Appellant.	E063690 (Super.Ct.No. RIF1103874) OPINION

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge. Affirmed with directions.

Diane Nichols, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler and Lance E. Winters, Chief Assistant Attorneys General, Julie L. Garland, Assistant Attorney General, and Charles C. Ragland, Scott C. Taylor and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Antoine Dion Ratcliffe appeals the judgment of premeditated murder, assault with a firearm, attempted premeditated murder, malicious discharge of a firearm into an occupied dwelling, and being a felon in possession of a firearm, with gang and firearm enhancements, and prior strikes. He raised multiple claims, including instructional error related to the "kill zone" theory of liability for attempted murder in CALCRIM No. 600. On July 12, 2017, we affirmed his convictions, but directed the trial court to modify the abstract of judgment by deleting the parole revocation fine. (*People v. Ratcliffe* (July 12, 2017, E063690) [nonpub. opn.], vacated Sept. 19, 2019.)

On October 25, 2017, the Supreme Court granted review in this matter and deferred further action pending consideration and disposition of *People v. Canizales*, review granted Nov. 19, 2014, S221958. Following the issuance of that opinion, the Supreme Court transferred the case back to this court with directions to vacate our opinion and reconsider the cause in light of *People v. Canizales* (2019) 7 Cal.5th 591 (*Canizales*), which limited application of the kill zone theory for attempted murder, Senate Bill 620 (Stats. 2017, ch. 682), and Senate Bill 1393 (Stats. 2018, ch. 1013). We do so now.

After considering the parties' supplemental briefs, we conclude (1) the trial court committed harmless error in instructing the jury with the kill zone theory, (2) defendant is entitled to the benefits of the recently enacted legislation related to sentencing enhancements, and (3) defendant is entitled to an ability to pay hearing on the fees and

fines assessed against him. We therefore affirm defendant's convictions, but remand for resentencing.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Facts.

After midnight on Saturday, June 11, 2011, a 17-year-old girl (the victim) was shot to death in Moreno Valley. She was in her parked car (a Honda Civic) with a group of girlfriends, talking to a group of boys.[1] Some of the boys were members of the Southside Mafia gang (Southside). Earlier in the evening, a male in a silver or gray Impala drove by the group of boys, who were attending a party, and yelled out "Web," indicating he was a member of the Sex Cash gang, the main enemy of Southside. The group of boys responded by yelling, "Fuck fags," a verbal show of disrespect toward a member of the Sex Cash gang. While the boys were talking to the girls, the Impala approached them on the opposite side of the street. One of the boys saw three people in the car—a woman and two Black males. Another boy yelled, "Fuck fags."

After seeing the Impala, J. and M. walked to the back of the Honda and stepped into the street, thinking somebody wanted to fight. The Impala stopped about 40 feet from the Honda, and defendant emerged from the back passenger side seat with a gun. He pointed it in the direction of the girls and the group of boys, fired three to five shots, and then started advancing toward the Honda. Defendant was pointing the gun, and shooting, at the boys, who began running away. As the victim pulled away from the

[1] Y. (count 3), M. (count 4), G. (count 5), and J. (count 6).

curb, defendant ran beside the victim's car, fired at the driver's side window, and killed the victim.

An investigation of the shooting led the Riverside County Sheriff's Department to defendant. Defendant was interviewed on June 12, July 8, and July 20, 2011.

B. Procedural Background.

A jury convicted defendant of premeditated murder (Pen. Code,[2] § 187, subd. (a), count 1), assault with a firearm (§ 245, subd. (a)(2), count 2), four counts of attempted premeditated murder (§§ 664, 187, subd. (a), counts 3, 4, 5, 6), malicious discharge of a firearm into an occupied dwelling (§ 246, count 7), and being a felon in the possession of a firearm (former § 12021, subd. (a)(1), count 8). It was further found true that defendant personally and intentionally discharged a firearm, causing great bodily injury or death to another person, who was not an accomplice (§ 12022.53, subd. (d)); that he personally and intentionally discharged a firearm (§ 12022.53, subd. (c), counts 3, 4, 5, 6); and that he committed the crimes for the benefit of a criminal street gang (§§ 186.22, subd. (b), 190.2(a)(22)). He admitted that he had suffered a prior serious felony conviction (§ 667, subd. (a)) and a prior strike conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). The trial court imposed a sentence of life without the possibility of parole (count 1), a determinate sentence of 96 years, plus an indeterminate sentence of 145 years to life.

Defendant appeals, contending: (1) the trial court prejudicially erred when it denied his motion to suppress his statement to detectives on July 20, 2011, because they

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[2] All further statutory references are to the Penal Code.

were obtained through deception, manipulation and promises of leniency; (2) the jury was improperly instructed on the kill zone theory pursuant to CALCRIM No. 600; (3) the prosecutor committed misconduct[3] during closing argument by misstating the legal standard to be applied in deciding whether provocation was legally sufficient to constitute heat of passion attempted voluntary manslaughter; (4) the trial court erred in instructing the jury on consciousness of guilt based on false statements using CALCRIM No. 362; (5) the cumulative error doctrine applies; and (6) the abstract of judgment must be modified by deleting the parole revocation fine. Following the first appeal, we affirmed the substantive convictions, but directed the trial court to modify the abstract of judgment.

The Supreme Court granted defendant's petition for review and deferred further action pending consideration and disposition of a related issue in *Canizales*. After the *Canizales* decision was issued, the high court transferred the matter to this court with directions to vacate our original decision and reconsider the cause in light of *Canizales*, Senate Bill No. 620 (Stats. 2017, ch. 682), and Senate Bill No. 1393 (Stats. 2018, ch. 1013). We also granted the parties permission to file supplemental briefs.

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[3] Prosecutorial error is a more apt description than prosecutorial misconduct. (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667.)

In supplemental briefing, defendant "reasserts that CALCRIM No. 600 was defective but also maintains the trial court erred in instructing the jurors on the kill zone theory of attempted murder when there was insufficient evidence to support giving the instruction." He further argues he is entitled to the benefits of the ameliorative changes to the law regarding firearm enhancements (§ 12022.53, subd. (h)) and prior serious felony conviction enhancements (§§ 667, subd. (a), 1385, subd. (b)); and the trial court erred in imposing various fees and assessments without determining his ability to pay. We agree that the trial court erred in instructing the jury on the kill zone theory, but find the error was harmless. We also agree defendant was entitled to the benefits of the ameliorative changes to the law regarding sentencing enhancements, as well as an ability to pay hearing. We therefore remand for resentencing. In all other respects, the judgment is affirmed.

II. DISCUSSION

A. The Trial Court Properly Denied Defendant's Motion to Suppress.

Defendant contends the trial court prejudicially erred when it denied his motion to suppress his statement to detectives on July 20, 2011. He claims that his statements, made after waiving his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), were obtained through deception, manipulation and promises of leniency. We disagree.

1. Further background facts.

On February 6, 2015, defendant filed a motion to suppress all of his audio recorded statements made during an interview on July 20, 2011, with Detectives Ronald

Waters and James Campos at Chino State Prison.[4] Defendant stated he was in prison because of a parole violation for gang affiliation and claimed his *Miranda* waiver was not

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[4] Defendant focuses on the following exchange that occurred prior to the advisement of his *Miranda* rights:

"INVESTIGATOR WATERS: . . . Antoine; right, partner?

"[DEFENDANT]: Hi, how are you doing?

"INVESTIGATOR WATERS: Good. Good, how are you, man?

"[DEFENDANT]: I'm all right. [¶] . . . [¶]

"INVESTIGATOR WATERS: Hey, I'm Investigator Waters, all right, and I'm with the sheriff's department—the homicide unit. [¶] . . . [¶] And my partner here—here he comes. . . . This is James Campos, all right.

"[DEFENDANT]: Un-huh.

"INVESTIGATOR WATERS: Hey, I know you already talked to Colmer—Lance Colmer. I'm—I'm the one that's working on the—that shooting out there in Moreno Valley— [¶] . . . [¶] —last month, I think, on the 9th or something like that.

"[DEFENDANT]: Yeah, I believe it was June 12th.

"INVESTIGATOR WATERS: Okay. Yeah. [¶] . . . [¶] Time is slipping away already. I'm the one . . . doing that investigation, all right. Colmer's been helping me, because he works for Moreno Valley out of that station, and, you know, I—I hop around from station to station, man— [¶] . . . [¶] —throughout the whole—this afternoon, I could be in, fricking, Blythe out in the desert, all right. [¶] . . . [¶] It's just the way it goes, but I want to take this—he told me that, you know, he violated you. He said— [¶] . . . [¶] —you know, so my point was, I actually wanted to talk to you myself before, you know, we were under these circumstances or anything. [¶] . . . [¶] All right?

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: But just I got busy and shit, and you know, shit happens but— [¶] . . . [¶] —I want to talk to you about it, you know. Some things have come up, you know. It's been over a month now. [¶] . . . [¶] But we're kind of, at the end of that, you know—kind of, at the end of my investigation right now.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: All right. And I know there—there's some issues that I need to deal directly with you about. [¶] . . . [¶] And I want to be able to afford you that opportunity to—to talk to me, so we can set things straight, you know.

"[DEFENDANT]: Okay.

"INVESTIGATOR WATERS: I'm not here to bull shit you.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: He's not, and—and I know you've been around a little bit, all right. And I'm going to expect the same from you. [¶] . . . [¶] All right. And everything's straight up. [¶] . . . [¶] What we talk about stays right here.

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"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: All right. I've been doing this job for over 23 years, man, and I know, you know, the first thing that's going to burn somebody is loose lips. [¶] . . . [¶] All right. So I tell you, you know, what—what's said here stays here. I'm not going to tell you what anybody else told me or—or who I've talked to or anything.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: I may give you bits and pieces. [¶] . . . [¶] But you ain't going to know who it's coming from or anything. [¶] . . . [¶] All right. You got my word on that, all right. So, basically—out—out of respect to you— [¶] . . . [¶] —all right—that's how I operate.

"[DEFENDANT]: Okay.

"INVESTIGATOR WATERS: And I know you can deal with some little, you know, youngster cops and shit, and, you know, things a little bit different. Those guys don't know the routine yet, all right. That's not how we operate.

"[DEFENDANT]: All right.

"INVESTIGATOR WATERS: All right. That's not how we do business.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: All right. But because you are here in custody—you're—you're not under arrest with me or anything. I'm not filing a case on you or anything like that. [¶] . . . [¶] I just—I know you're here because Colmer violated you for some gang shit and—

"[DEFENDANT]: Yeah, and I also have questions too, yeah.

"INVESTIGATOR WATERS: All right.

"[DEFENDANT]: About what are my violation charge?

"INVESTIGATOR WATERS: Okay. The bottom line is I don't—I don't want to talk to you about all that stuff. If there's something I can answer, I'll try to answer. [¶] . . . [¶] All right. But I'm not going to . . . bull shit you along, all right—and give you some fucked-up answer that just—I'm not going to tell you what you want to hear or make some shit up.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: All right. But, Antoine, because you are in custody here, I have to read you your rights, okay.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: And it's just—it's a legal thing.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: Protects you, protects me.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: All right. . . . [Reads defendant his *Miranda* rights.] [¶] . . . [¶]

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knowing and intelligent due to improper inducement, and his statements were involuntary based on promises of leniency. The prosecution opposed the motion. On April 6, 2015, the trial court affirmed that it had listened to the audiotape while using the transcript and read the briefs. After hearing argument from the parties, the court denied the motion, finding defendant was not "tricked" into waiving his *Miranda* rights, and his statements were voluntary because there were no promises of leniency.

2. Standard of review.

"'A statement is involuntary if it is not the product of "'a rational intellect and free will.'" [Citation.] The test for determining whether a confession is voluntary is whether the defendant's "will was overborne at the time he confessed." [Citation.] "'The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were "such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." [Citation.]' [Citation.] In determining whether or not an accused's will was overborne, 'an examination must be made of "all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."'"'" (*People v. McWhorter* (2009) 47 Cal.4th 318, 346-347.) On appeal, we defer to the trial court's factual findings concerning the circumstances surrounding the interrogation, but we

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"INVESTIGATOR WATERS: Okay. Do you want to—do you want to continue talking with me or— [¶] [DEFENDANT]: I mean, I—I can."

independently review the voluntariness of the defendant's statements under the totality of the circumstances. (*People v. Massie* (1998) 19 Cal.4th 550, 576.)

3. Analysis.

In contending his statements were not the product of a voluntary waiver of his *Miranda* rights, defendant accuses Detective Waters of "positioning himself as someone who would not have violated [defendant] on parole, minimizing the significance of the interview, presenting the interview as beneficial to [defendant], portraying himself as a candid self-shooter, [*sic*] telling [defendant] twice that their conversation would remain there," and trivializing the advisement as being "'just'" a "'legal thing'" that "'[p]rotects you, protects me.'" Defendant adds that the detective impliedly promised leniency when he stated defendant was not under arrest and he (the detective) was not filing any charges against defendant. Rejecting defendant's contentions, we conclude the trial court did not err in denying the motion to suppress and finding a valid waiver of *Miranda* rights.

In *People v. Honeycutt* (1977) 20 Cal.3d 150 (*Honeycutt*), on which defendant relies, the Supreme Court found the officers deliberately plotted "from the inception of the conversation" to induce the defendant to waive his *Miranda* rights, engaging in false ploys that included a "bad cop/good cop" or "Mutt and Jeff routine" and remarks to discredit the victim. (*Honeycutt*, *supra*, at pp. 159, 160, fn. 5.) Specifically, the *Honeycutt* detectives drew the defendant into a hostile confrontation with the first officer, whom the defendant spat at and called racial epithets. Then that officer left, and the second officer, who knew the defendant well, engaged him in conversation about unrelated matters and former acquaintances for a half hour, while also disparaging the

murder victim as a suspect in a homicide and a person of "homosexual tendencies." (*Id*. at p. 158.) The *Honeycutt* court found the use of these coercive stratagems before a *Miranda* advisement rendered the defendant's ensuing *Miranda* waiver and confession involuntary. The court explained: "When the waiver results from a clever softening-up of a defendant through disparagement of the victim and ingratiating conversation, the subsequent decision to waive without a *Miranda* warning must be deemed to be involuntary for the same reason that an incriminating statement made under police interrogation without a *Miranda* warning is deemed to be involuntary." (*Honeycutt*, *supra*, at pp. 160-161.) According to the court: "Detective Williams had, prior to explaining the *Miranda* rights, already succeeded in persuading defendant to waive such rights." (*Id*. at p. 159.)

The facts before us are readily distinguishable from those in *Honeycutt*. First, there is no evidence that Detective Waters knew of, or had any relationship with, defendant. Second, the prewaiver talk was recorded. Third, neither of the detectives talked about the victim or others present, disparaging them to encourage defendant to talk. Fourth, there was no discussion of any unrelated past events or former acquaintances in order to ingratiate defendant into talking. Fifth, defendant was no neophyte in police custody, having been arrested before, and his admissions indicated he knew he was a suspect in the shooting. Sixth, while Detective Waters referred to the *Miranda* warning as a "legal thing," he did not refer to it as a mere technicality, nor did he downplay defendant's rights.

This case is more analogous to *People v. Musselwhite* (1998) 17 Cal.4th 1216. In *Musselwhite*, the Supreme Court rejected the defendant's claim that his *Miranda* waiver was invalid because investigators minimized the rights conferred by *Miranda,* thereby suggesting in the defendant's characterization that they were an "unimportant 'technicality.'" (*Musselwhite, supra,* at p. 1237.) The court agreed with "the proposition that evidence of police efforts to trivialize the rights accorded suspects by the *Miranda* decision—by 'playing down,' for example, or minimizing their legal significance—may under some circumstances suggest a species of prohibited trickery and weighs against a finding that the suspect's waiver was knowing, informed, and intelligent." (*Ibid*.) However, the court found no support for defendant's claim: "Given the brevity, as well as the accuracy, of Detective Bell's statement, the fact that the officers never described the *Miranda* warning as a 'technicality' or used similar words, the absence of similar comments during the course of the questioning, defendant's record of police encounters as evidenced by two prior felony convictions, the likelihood he was aware he was a suspect in a murder investigation . . . we conclude the record fails to support defendant's claim that the importance of his *Miranda* rights was misrepresented by the detectives and that he was thereby 'tricked' into waiving them." (*Id*. at p. 1238.)

For the above reasons, we reject defendant's claim that Detective Waters employed the *Honeycutt* softening-up technique to obtain a waiver of *Miranda* rights.

Likewise, we reject defendant's claim that his statements were involuntary and inadmissible because of the detective's alleged implied promises of leniency. In addition to pointing out Detective Waters's sole prewaiver statement about "not filing a case"

against defendant, defendant points out several post-*Miranda* statements by the detective which defendant asserts support his claim of "express and clearly implied promises of leniency." Specifically, defendant emphasizes the following: (1) the detective reiterated that he was "not filing any charges" against defendant; (2) the detective allegedly minimized the crime by implying the situation just "[got] out of control" or "got to a boiling point," the young girl who died was "more a victim of circumstance of a situation that got out of control," it may not be murder because it "depends on the circumstances," and "[t]his ain't a murder case"; (3) the detective suggested that telling the truth meant the incident would become part of the past that would "go away over time"; and (4) the detective stated he could make recommendations to the district attorney depending on whether defendant talked.

A confession elicited by any promise of benefit or leniency, whether express or implied, is involuntary and therefore inadmissible. (*People v. Davis* (2009) 46 Cal.4th 539, 600.) However, merely advising a suspect that it would be better to tell the truth, when unaccompanied by either a threat of harm or a promise of benefits, does not render a confession involuntary. (*People v. Holloway* (2004) 33 Cal.4th 96, 115.) In determining whether defendant's confession was the product of a promise of leniency, we consider both Detective Waters' and defendant's postwaiver statements, along with defendant's familiarity with the criminal process.

Here, the detective urged defendant, on several occasions during the interrogation, to tell the truth about what happened. There were no promises of leniency in the detective's statements that (1) defendant was not under arrest; (2) the detective was not

filing a case against defendant; (3) the detective had to talk to the district attorney; (4) the detective could make recommendations to the district attorney; or (5) the incident did not rise to the level of murder. In fact, Detective Waters specifically told defendant that he could not and was not going to "make [him] any promises." The detective later added: "Am I sitting here telling you that if you cooperate with me, nothing's going to happen? I'm not telling you that." Defendant admitted: "I've been through the system, so I know how it is. [¶] . . . [¶] . . . I know how it works, man." Defendant acknowledged that he already had two strikes, adding: "I'd rather take two strikes any day over doing life in prison, but, at the same time, it's still, basically, the same thing." When defendant accused Detective Waters of coming to "pressure a person," the detective replied: "I'm not pressuring—no pressure." When defendant accused Detective Waters of looking for someone to admit to the shooting, the detective disagreed, saying: "No. No. I'm going to stop you right there." Defendant recognized that it was "up to the jury," not Detective Waters, as to who goes to jail. There is no indication that the detective expressly or impliedly promised leniency in order to manipulate defendant into a confession.

In the totality of the circumstances surrounding the interview, the evidence does not suggest defendant's *Miranda* waiver was anything but voluntary, knowing, informed, and intelligent. The trial court did not err in denying defendant's suppression motion.

B. Any Error Resulting From Instructing the Jury on the Kill Zone Theory Was Harmless.

Since the decision in *Canizales* "significantly restricted the kill zone theory of attempted murder," defendant contends he "is entitled to the benefit of the less expansive

interpretation of the kill zone theory." Asserting that "it is not even clear who the primary targets were, let alone whether the shooter intended to create a fatal zone of harm around that target and anyone near him," defendant "maintains the trial court erred in instructing the jurors on the kill zone theory of attempted murder when there was insufficient evidence to support giving the instruction."[5]

We agree there was insufficient evidence to support a kill zone instruction because there was no evidence defendant had a primary target. (*Canizales, supra*, 7 Cal.5th at p. 608 ["When the kill zone theory is used to support an inference that the defendant concurrently intended to kill a nontargeted victim, however, evidence of a primary target is required."]; *People v. Medina* (2019) 33 Cal.App.5th 146, 156 ["a kill zone instruction is not appropriate where a defendant fires a deadly weapon into a group of individuals with the intent to kill but without a primary target. Nor, in the absence of a primary target, is a kill zone instruction appropriate even if the defendant intends to kill everyone in that group."].) The prosecutor did not identify a primary target. Rather, she argued

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[5] In his opening brief, defendant argues the phrase "kill zone" is argumentative and inflammatory, unduly favoring the prosecution. As such, he asserts that the phrase compelled the jury to conclude he had the requisite intent to kill. This same issue was raised and rejected in *Campos*. In that case, the court concluded: "CALCRIM No. 600 merely employs a term, 'kill zone,' which was coined by our Supreme Court in *Bland* and referred to in later California Supreme Court cases. [Citation.] It does not invite inferences favorable to either party and does not integrate facts of this case as an argument to the jury. Other disparaging terms, including 'flight' (CALJIC No. 2.52), 'suppress[ion] of evidence' (CALJIC No. 2.06) and 'consciousness of guilt' (CALJIC No. 2.03) have been used in approved, longstanding CALJIC instructions. We see nothing argumentative in this instruction." (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1244.) We agree with the *Campos* court's conclusion.

defendant attempted to kill all of the boys in the group, Y., M., G., and J. There is also no evidence that defendant singled out any one boy as the primary target. Therefore, a kill zone instruction was not supported in this case. However, we conclude that any error resulting from the kill zone instruction was harmless.

1. Further background facts.

Defendant was charged with four counts of attempted first degree murder (§§ 664, 187, subd. (a), count 3 (Y.), count 4 (M.), count 5 (G.), & count 6 (J.)), with allegations of personal discharge of a firearm (§ 12022.53, subd. (c)) and street gang benefit (§ 186.22, subd. (b)). Although the prosecutor argued that defendant specifically intended to kill each of the four boys, she also argued that defendant sprayed bullets at the victim's car, creating a kill zone with the intention of killing everyone present.[6] The parties and the trial court discussed CALCRIM No. 600. Defense counsel wanted the instruction clarified; however, he failed to specify any clarification or modification to the instruction.

The jury was instructed on attempted murder using the language of CALCRIM No. 600. As given in this case, the pertinent portion of that instruction states: "The defendant is charged in Counts Three, Four, Five and Six with attempted murder. [¶] To prove that the defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant took at least one direct but ineffective step toward killing another

[6] The kill zone theory was adopted by the California Supreme Court in *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*).)

person; [¶] AND [¶] 2. The defendant intended to kill that person. [¶] . . . [¶] A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of [Y., M., & G.] and/or [J.], the People must prove that the defendant intended to kill each one of them, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill [Y., M., & G.] and/or [J.] or intended to kill everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of any one or all of those alleged victims."

2. Applicable law.

Attempted murder requires the specific intent to kill, or express malice, and the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Superior Court* (*Decker*) (2007) 41 Cal.4th 1, 7.) When a defendant attempts to kill two or more persons by a single act, the element of intent to kill must be examined independently as to each alleged victim. (*Bland*, *supra*, 28 Cal.4th at pp. 327-328.) While transferred intent does not apply to attempted murder (*People v. Souza* (2012) 54 Cal.4th 90, 120), concurrent intent does, such that "a person who shoots at a group of people [may still] be punished for the actions towards everyone in the group even if that person primarily targeted only one of them." (*Bland*, at pp. 329; see *id*. at p. 331.) *Bland* concluded that a concurrent intent can be found when a kill zone is created, that is, when the defendant intends to kill a specific person and in order to do so employs a means that will cause the death of every person in the immediate vicinity of the target, the defendant may be liable for the attempted murder of every such person. (*Id*. at p. 329.)

"The kill zone theory embraced by *Bland*, as it relates to multiple attempted murder charges, is necessarily defined by the nature and scope of the attack." (*People v. Windfield* (Dec. 20, 2019, E055062) 2019 Cal.App. Lexis 1320, *36.) However, the theory has led to some anomalous results (see e.g., *People v. Perez* (2010) 50 Cal.4th 222, 232 [defendant convicted of eight counts of attempted murder after firing a single shot at a group of police officers standing in close proximity, 60 feet away from defendant]) and created a disagreement among the appellate courts "regarding the evidentiary basis for applying, and instructing on, the kill zone theory for establishing the intent to kill element of attempted murder." (*Canizales*, *supra*, 7 Cal.5th at p. 602.) Therefore, last year, the California Supreme Court limited the application of the kill zone theory. (*Canizales*, at pp. 596-597.)

In *Canizales*, a codefendant fired five shots in the general direction of two rival gang members from across the street, a distance of either 100 or 160 feet away. One of his bullets struck an innocent bystander who was near her parked car. (*Canizales*, *supra*, 7 Cal.5th at pp. 599-600.) The defendants were convicted of one count of murder and, under the kill zone theory, two counts of premeditated attempted murder as to the two rival gang members. (*Id.* at p. 601.)

On appeal, the California Supreme Court resolved "that the kill zone theory for establishing the specific intent to kill required for conviction of attempted murder may properly be applied only when a jury concludes: (1) the circumstances of the defendant's attack on a primary target, including the type and extent of force the defendant used, are such that the only reasonable inference is that the defendant intended to create a zone of

fatal harm—that is, an area in which the defendant intended to kill everyone present to ensure the primary target's death—around the primary target and (2) the alleged attempted murder victim who was not the primary target was located within that zone of harm." (*Canizales, supra,* 7 Cal.5th at p. 607.) *Canizales* further instructs that the determination of the intent to create a kill zone and the scope of the kill zone requires consideration of "the circumstances of the offense, such as the type of weapon used, the number of shots fired (where a firearm is used), the distance between the defendant and the alleged victims, and the proximity of the alleged victims to the primary target." (*Ibid.*)

The *Canizales* decision advises trial courts to exercise caution when the prosecution seeks to rely upon the kill zone theory, and to provide such "instruction to the jury only in those cases where the court concludes there is sufficient evidence to support a jury determination that the *only* reasonable inference from the circumstances of the offense is that a defendant intended to kill everyone in the zone of fatal harm. The use or attempted use of force that merely *endangered* everyone in the area is insufficient to support a kill zone instruction." (*Canizales*, *supra*, 7 Cal.5th at p. 608.) Applying its analysis of the kill zone to the facts of the case, the *Canizales* court concluded there was insufficient evidence to support the kill zone instruction because the codefendant attacked the target by firing a limited number of bullets (five) at the distance of either 100 or 160 feet away, the attack occurred at a block party on a wide city street (not an alleyway, cul-del-sac, or area with a limited means of escape), and the primary target immediately ran away after the first shot was fired. (*Id.* at p. 611.)

If a jury has been instructed on the kill zone theory in error, reversal is not automatic. Instead, we review the error for prejudice under the standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (*People v. Aledamat* (2019) 8 Cal.5th 1, 13.) Under this standard, "[t]he reviewing court must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, it determines the error was harmless beyond a reasonable doubt." (*Ibid*.) In other words, the reviewing court must determine beyond a reasonable doubt that a reasonable jury would have rendered the same verdict absent the error. (*Canizales*, *supra*, 7 Cal.5th at p. 615.)

3. Analysis.

Here, we conclude beyond a reasonable doubt that the jury would have rendered the same verdict absent the instructional error. The jury was instructed on two theories of criminal liability for attempted murder: direct intent and concurrent intent under the kill zone theory. The evidence strongly supports a finding of a direct or specific intent to kill. To begin with, the shooting occurred in response to one of the boys disrespecting defendant's gang by saying, "Fuck fags." Examining the scene, detectives found a trail of expended shell casings leading down the street from where defendant emerged from the Impala to the location of the Honda and the group of boys. This evidence suggests defendant specifically targeted the boys and came closer in order to increase his chances of hitting his targets. Y. and other witnesses testified defendant was pointing his gun at

all of them and the Honda.[7] Defendant admitted that he approached the group of boys and "started shooting" because he thought they were going to "start approaching" him. This admission raises the inference that defendant targeted each and every one of the boys in the group. He fired seven shots from a close distance (40 feet or less), and there was no evidence that his shots were going everywhere. Moreover, the fact that defendant deliberately fired a shot through the driver's window of the Honda, hitting the victim, supports an inference of direct intent to kill as to the shootings.

During closing argument, the prosecutor argued defendant's intent to kill was evidenced by his actions: (1) Responding to the boys shouting, "Fuck fags," by attacking them with a gun; (2) jumping out of his car (instead of remaining inside) and pointing the gun directly at them; (3) firing at the boys while standing still and then advancing toward them; (4) continuing to fire the gun until it ran out of bullets; and (5) attacking the boys from only 40 feet away. Later, the prosecutor stated: "*We've already talked about the attempted murder. But I want to add one thing to this. There is something called the kill zone*." (Italics added.) In response, defense counsel briefly explained what the kill zone

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[7] Y. testified that defendant began shooting in the middle of the street, walking "towards everybody," and pointing his gun in the "same direction that everybody [was] standing in." Y. later added: "[W]e're all in the same area. So even if he was aiming at them, it's still my way."

J. testified that he did not see a gun, but heard shots and saw defendant with his hand up, "probably" pointing the gun at him, "coming our way. Everybody, we was all in the same spot." J. later added that he did not see where defendant was pointing the gun, but he saw three shots fired into the driver's side of the Honda.

G. testified defendant pointed the gun in the "general direction" of the boys.

M. testified that defendant was pointing the gun at "[a]ll of us" and "jogging towards us" as he was shooting.

means: "[Y]ou have the intent to kill everybody within that area. If you want to kill somebody, in order to kill that person, you know you have to take everybody out, kill them, in that area." However, defense counsel focused on creating reasonable doubt as to defendant's direct intent to kill by arguing that his actions showed only an intent to scare the group of boys, not kill them. According to counsel, defendant "panic[ked], and he pull[ed] the gun out, and he start[ed] to shoot the gun."

CALCRIM No. 600 instructed the jury on the necessity of finding a specific intent to kill in order to convict defendant of attempted murder. Additionally, the jury was instructed that it had to decide whether the People proved the attempted murder was done willfully, and with deliberation and premeditation (CALCRIM No. 601 (Attempted Murder: Deliberation and Premeditation). The jury was also instructed on the lesser included offenses of attempted voluntary manslaughter based on the heat of passion (CALCRIM No. 603) and attempted voluntary manslaughter based on imperfect self-defense (CALCRIM No. 604).

Given the evidence, the arguments, and the jury instructions, we conclude beyond a reasonable doubt that the jury reasonably found defendant specifically intended to kill all four boys when he fired. Any error resulting from the kill zone instruction was harmless because the jury would have rendered the same guilty verdicts as to all four attempted murder charges.

Notwithstanding the above, defendant maintains the error is not harmless because the content of CALCRIM No. 600, coupled with the prosecutor's "scant, oversimplified,

and confusing" treatment of the kill zone theory of liability,[8] "conflated the specific intent to kill, required for attempted murder, with lesser mental states like reckless disregard and criminal negligence."

We reject defendant's argument. First, we note that *Canizales* expressly declined to invalidate the standard kill zone instruction under CALCRIM No. 600, but suggested "the standard instruction should be revised to better describe the contours and limits of the kill zone theory" as articulated in the opinion. (*Canizales, supra,* 7 Cal.5th at p. 609.) Second, CALCRIM No. 600 did not minimize, omit, or affirmatively misstate the requisite intent to kill each of the boys, whether as a primary target or otherwise. It properly required proof of an intent to kill each boy, or alternatively, an intent to kill everyone within the kill zone. (*Canizales*, at p. 607.) Moreover, the instruction confirmed the necessity of an acquittal of the attempted murder of Y., M., G. and/or J., if the jurors had a reasonable doubt as to the intent to kill each of them or the intent to kill everyone in the kill zone. Third, the prosecutor also explicitly confirmed the requisite intent to kill applicable to the kill zone theory when she stated: "[A] person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm." The comment properly described the concept of concurrent intent. (*Canizales*, at p. 603; *Bland*, *supra*, 28 Cal.4th at p. 329.)

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[8] The prosecutor commented: "[B]asically what the law says, a person may intend to kill a specific victim or victims at the same time—or people at the same time all in the zone. [¶] So, like, if somebody comes in here, and you all are standing in a group, and they shoot at somebody in the group, everybody's in that kill zone, just like you heard those boys say."

And finally, we do not judge a challenged instruction in isolation. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.) The correctness of jury instructions is to be determined from the entire charge to the jury (*People v. Bolin* (1998) 18 Cal.4th 297, 328), and "'we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.'" (*People v. Richardson*, at p. 1028; accord, *People v. Johnson* (2009) 180 Cal.App.4th 702, 710.) Our review of the totality of the jury instructions demonstrates that no reasonable juror could have believed defendant could be convicted of attempted murder on a kill zone theory without a finding of a specific intent to kill each of the boys; that is, no reasonable juror could have believed that implied malice was sufficient.

C. The Prosecutor's Error During Closing Argument Was Harmless.

Defendant contends the prosecutor committed prejudicial error during closing argument by misstating the legal standard to be applied in deciding whether provocation was legally sufficient to constitute heat of passion attempted voluntary manslaughter, and the trial court erred in failing to sustain the defense objection to the prosecutor's misstatement of the law.

1. Further background facts.

While discussing jury instructions, defense counsel requested an instruction on the lesser included offense of heat of passion attempted voluntary manslaughter. The prosecutor noted there was no evidence to support the instruction; however, she did not object because she did not want any conviction overturned for not giving the instruction.

The trial court instructed the jury on attempted heat of passion voluntary manslaughter with CALCRIM No. 603.

During closing argument, the prosecutor stated: "So the next thing they may try to do is argue for a lesser offense. Let's argue for a voluntary manslaughter. There's two ways to get there. You can get there by heat of passion or imperfect self-defense. Okay? [¶] So let me tell you what a heat of passion is. The defendant has to be provoked, and as a result of provocation, he acts rashly and under the influence of intense emotion that obscured his reasoning and judgment. The provocation—this is the important part—would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than judgment. [¶] What this is saying is, again, this is a reasonable person standard. *A reasonable person under the same facts would have thought that they needed to kill or would have been so consumed by passion and so provoked that they would have killed*." (Italics added.)

Defense counsel objected on the basis of misstatement of the law and the trial court overruled the objection.

The prosecutor continued: "Let me give you an example of that. Say a husband walks in on his wife in bed with somebody else. I think we can all look at that situation and go, I probably would kill somebody. Or a guy walking in on somebody molesting his kid. You might kill somebody. That's—all of us, as average people, can understand that your passions would be so inflamed that somebody was probably going to be dead. Right? That's what heat of passion is."

During defense counsel's closing, he stated that there were two different theories of voluntary manslaughter, but that "I'm not going to talk about heat of passion. I'm only going to talk about imperfect self-defense. Please look at both instructions. This is very important." Defense counsel did, however, briefly argue that the comment, "Fuck fags," was the provocation that was needed for attempted voluntary manslaughter.

Following closing arguments, and outside the presence of the jury, cocounsel for defense argued to the trial court that the prosecutor had misstated the law of heat of passion by arguing that the law was whether a reasonable person would be inflamed and provoked to the point of killing, instead of whether a reasonable person would be inflamed to act rashly. The prosecutor disagreed. The court stated: "Well, you're free to do that if you want to supplement your argument, though it doesn't appear to be part of your defense." Cocounsel for defense responded: "It is part of our defense. It just wasn't argued." The court then replied: "It wasn't argued. Well, if you want to supplement the record with some cases, I'll be happy to read them."

2. Applicable law.

We agree the prosecutor erred in misstating the law regarding the proper standard for assessing the legal sufficiency of provocation. In *People v. Beltran* (2013) 56 Cal.4th 935, the California Supreme Court explained that heat of passion is a state of mind that "precludes the formation of malice and reduces an unlawful killing from murder to manslaughter," and heat of passion is "caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation." (*Id*. at p. 942, fn. omitted.) Under the proper standard, "[p]rovocation is

adequate only when it would render an ordinary person of average disposition 'liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'" (*Id*. at p. 957.) The Supreme Court rejected the Attorney General's argument that the proper standard for assessing the adequacy of provocation is whether an ordinary person of average disposition would be moved to kill. (*Id*. at pp. 946, 949.)

Having concluded the prosecutor erred in this case, we must determine whether reversal is warranted. A prosecutor's remarks can "'"so [infect] the trial with unfairness as to make the resulting conviction a denial of due process."'" (*People v. Frye* (1998) 18 Cal.4th 894, 969.) In such cases, the error amounts to federal constitutional error, and reversal is required unless we conclude it was harmless beyond a reasonable doubt. (*People v. Estrada* (1998) 63 Cal.App.4th 1090, 1096, 1106-1107, citing *Chapman, supra,* 386 U.S. at p. 24.) If the prosecutor's remarks did not rise to that level, we will not reverse unless we conclude it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the misconduct. (*People v. Crew* (2003) 31 Cal.4th 822, 839-840; *People v. Zurinaga* (2007) 148 Cal.App.4th 1248, 1260, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

3. Analysis.

Defendant claims the prosecutor's argument was no different from the argument deemed improper in *People v. Najera* (2006) 138 Cal.App.4th 212 (*Najera*) and constituted a "serious mis-statement of the law" requiring reversal of his conviction. In *Najera*, the defendant stabbed and killed the victim about five to 10 minutes after the victim called the defendant a "'jota' (translated as 'faggot')." (*Id*. at p. 216.) During

closing argument, the prosecutor stated: "'Heat of passion is not measured by the standard of the accused. . . . As a jury, you have to apply a reasonable, ordinary person standard. . . . *Would a reasonable person do what the defendant did?* Would a reasonable person be so aroused as to kill somebody? That's the standard.'" (*Id.* at p. 223.) "During rebuttal, the prosecutor stated: '*[T]he reasonable, prudent person standard . . .* [*is*] *based on conduct, what a reasonable person would do in a similar circumstance.* Pull out a knife and stab him? I hope that's not a reasonable person standard.'" (*Ibid*.) In *Najera*, the court explained that the italicized portions of the prosecutor's statements were incorrect: "An unlawful homicide is upon '"a sudden quarrel or heat of passion"' if the killer's reason was obscured by a '"provocation"' sufficient to cause an ordinary person of average disposition to act rashly and without deliberation. [Citation.] The focus is on the provocation—the surrounding circumstances—and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion." (*Ibid*.) The court noted that the prosecutor had "interspersed correct statements of the law with the incorrect ones," and concluded: "The trial court correctly instructed the jury to follow the court's instructions, not the attorneys' description of the law, to the extent there was a conflict. We presume the jury followed that instruction." (*Id*. at pp. 223-224.)

Here, as in *Najera*, the italicized portion of the prosecutor's argument is incorrect. But, also, as in *Najera*, the prosecutor interspersed correct statements of the law with the incorrect ones. There is no dispute the trial court properly instructed the jury with

CALCRIM No. 603. Furthermore, as in *Najera*, the jury was instructed to follow the court's instructions, not the attorneys' description of the law, to the extent there was a "conflict." (CALCRIM No. 200.) We presume the jury followed CALCRIM No. 603. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

Moreover, we conclude that defendant suffered no prejudice from the prosecutor's misstatement, because the evidence did not "'properly present[]' the issue of sudden quarrel or heat of passion. [Citation.] In other words, [defendant] suffered no prejudice because he was not entitled to an instruction on voluntary manslaughter in the first place." (*Najera*, *supra*, 138 Cal.App.4th at p. 225.) The only provocation in this case was the yelling, "Fuck fags," an insult to defendant, who was a Sex Cash gang member.[9] As in *Najera*, "[t]hat taunt would not drive any ordinary person to act rashly or without due deliberation and reflection. '"A provocation of slight and trifling character, such as words of reproach, however grievous they may be, or gestures, or an assault, or even a blow, is not recognized as sufficient to arouse, in a reasonable man, such passion as reduces an unlawful killing with a deadly weapon to manslaughter."'" (*Najera*, at p. 226; see *People v. Manriquez* (2005) 37 Cal.4th 547, 586 [instruction on voluntary manslaughter based upon theory of a sudden quarrel or heat of passion not warranted when victim called defendant a "'mother fucker'" and taunted him to take out his weapon

[9] Defendant asserts the provocative conduct also included things that happened at the party and immediately thereafter. However, defendant did not attend the party and offered no evidence of what, if anything, occurred at the party. Instead, the evidence shows that defendant shouted "Web" from inside the Impala when they drove by the party, and that the immediate response from Southside members was "Fuck fags."

and use it].) Yelling, "Fuck fags," was insufficient to cause an ordinary person to lose reason and judgment under an objective standard. Because defendant was not entitled to a heat of passion attempted voluntary manslaughter instruction, the prosecutor's error did not cause him to suffer any prejudice.

D. CALCRIM No. 362 Relating to Consciousness of Guilt Was Properly Given.

Defendant contends CALCRIM No. 362 (consciousness of guilt based on false statements) was improperly given because it "told the jury that a defendant's false or misleading statements 'relating to the charged crime . . . may show he was *aware of his guilt of the crime*.'" He argues the instruction violated his rights to due process, a fair trial, and equal protection. We disagree.

1. Further background facts.

The prosecutor requested CALCRIM No. 362 based on defendant's misleading statements regarding his alibi. Defendant raised no objection. The trial court instructed the jury with CALCRIM No. 362: "If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

2. Analysis.

Defendant's arguments on appeal are unavailing because the California Supreme Court has held that CALCRIM No. 362 is a correct statement of the law and does not run

afoul of constitutional strictures. (*People v. Howard* (2008) 42 Cal.4th 1000, 1025 ["We have repeatedly rejected arguments attacking [CALCRIM No. 362]]," citing *People v. Nakahara* (2003) 30 Cal.4th 705, 713 [rejecting challenges to CALJIC No. 2.03,[10] a "consciousness of guilt" instruction that was predecessor of and basically identical to CALCRIM No. 362].) The instruction does not invite the jury to draw irrational and impermissible inferences of guilt when there is a basis for the jury to make an inference that a defendant made a self-serving statement to protect himself. (*People v. Moore* (2011) 51 Cal.4th 386, 414, relying on *People v. Howard*, *supra*, at pp. 1021, 1025.) Nor does it direct the jury to make the falsity of defendant's statement the determinative factor in their deliberations because it explicitly instructs that "'evidence that the defendant made [a false or misleading] statement cannot prove guilt by itself.'" Moreover, CALCRIM No. 362 is not an improper pinpoint instruction. (*People v. McGowan*, *supra*, 160 Cal.App.4th at p. 1104 ["CALCRIM No. 362 is not an unlawful 'pinpoint' instruction"]; see *People v. Alexander* (2010) 49 Cal.4th 846, 922 [noting court's consistent rejection of contention that standard consciousness-of-guilt instructions

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10 CALCRIM No. 362 is the successor to CALJIC No. 2.03, and the two instructions are substantively identical. (See *People v. McGowan* (2008) 160 Cal.App.4th 1099, 1104 ["Although there are minor differences between CALJIC No. 2.03 and CALCRIM No. 362 . . . none is sufficient to undermine our Supreme Court's approval of the language of these instructions."].) CALJIC No. 2.03 provides as follows: "If you find that before this trial [the] defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which [he] is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

were improperly argumentative in "'pinpoint[ing]' the prosecution's argument regarding how the jury should view certain evidence"].)

Defendant's claim that CALCRIM No. 362 is unconstitutional because it employs the phrase "aware of his guilt of the crime" instead of "consciousness of guilt" is foreclosed by *People v. Hernández Ríos* (2007) 151 Cal.App.4th 1154, which found no constitutional infirmity on account of the term "aware of his guilt" in CALCRIM No. 372, a related "flight" instruction. Under *Hernández Rios*, the use of the term, "aware of his guilt," in the CALCRIM instructions on false statements, flight, and fabrication of evidence, respectively, is entirely consistent with the use of the term "consciousness of guilt" in the predecessor line of CALJIC instructions on the same topics. (*Hernández Rios*, at pp. 1158-1159.)

CALCRIM No. 362 was properly read to the jury, did not create an impermissible inference, or lessen the prosecutor's burden of proof.

E. The Cumulative Error Doctrine Does Not Apply.

Defendant asserts that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844, 847 [noting "negative synergistic effect" of errors there resulted in a degree of prejudice "more than that flowing from the sum of individual errors"].) Based on this legal principle, he contends the cumulative impact of the foregoing alleged errors violated his right to a fair trial. We disagree. The two errors (instructing on the kill zone theory and the prosecutor's misstatement of the law regarding the proper standard for assessing the legal sufficiency of provocation) we

have found were unrelated to each other, nonprejudicial, and had no cumulative effect. Thus, no cumulative error requiring reversal occurred.

F. Defendant is Entitled to a New Sentencing Hearing.

1. Resentencing under section 12022.53, subdivision (h).

The parties agree remand is appropriate for the trial court to exercise its discretion whether to strike the firearm enhancements imposed on counts 3, 4, 5, and 6 (§ 12022.53, subd. (c) [intentional/personal discharge of firearm]) and counts 1 and 7 (§ 12022.53, subd. (d) [intentional/personal discharge of firearm causing death]). We concur.

Prior to January 1, 2018, an enhancement under section 12022.53 was mandatory and could not be stricken in the interests of justice. (See former 12022.53, subd. (h), added by Stats. 2010, ch. 711, § 5; *People v. Felix* (2003) 108 Cal.App.4th 994, 999.) Senate Bill No. 620 amended section 12022.53, subdivision (h), to permit the trial court to strike firearm enhancements imposed under that statute.[11] (Stats. 2017, ch. 682, § 2.) This amendment applies retroactively. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [remanding pursuant to the amended § 12022.53]; see *In re Estrada* (1965) 63 Cal.2d 740, 744.) Furthermore, remand is appropriate here—where there is no clear indication how the court would have exercised its discretion to strike or dismiss the firearm enhancements under section 12022.53, subdivision (h), if it had the authority to

[11] "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§ 12022.53, subd. (h).)

do so. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081-1082; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428.)

2. Resentencing under sections 667, subdivision (a) and 1385, subdivision (b).

The parties agree, and we concur that under the versions of section 667, subdivision (a), and section 1385, subdivision (b), in effect when defendant was sentenced on May 22, 2015, the trial court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (former § 667, subd. (a); Stats. 1994, ch. 12, § 1; amendment approved by voters, Prop. 36 § 2, eff. Nov. 7, 2012), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (former § 1385, subd. (b); Stats. 2014, ch. 137, § 1, eff. Jan. 1, 2015.) However, on September 30, 2018, while this appeal was pending, the Governor signed Senate Bill No. 1393 (Stats. 2018, ch. 1013, § 1, eff. Jan. 1, 2019), which amended sections 667, subdivision (a), and 1385, subdivision (b), to allow a trial court to exercise its discretion whether to strike or dismiss a prior serious felony conviction for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) The amendments apply to all cases that, like defendant's, were not final on their effective date. (*Id*. at p. 973.) The matter accordingly must be remanded to the trial court for it to exercise its discretion under sections 667, subdivision (a), and 1385, subdivision (b), as amended by Senate Bill No. 1393. (*Garcia*, at p. 973.)

G. Imposition of Fines, Fees, and Assessments.

Defendant asserts that under the reasoning in *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1168 (*Dueñas*), the imposition of a $240 conviction fee (Gov. Code, § 70373), a $320 court operations fee (Pen. Code, § 1465.8), and a $10,000 restitution fine (Pen. Code, § 1202.4) without a determination that he has the ability to pay violated his right to due process under both the United States and California Constitutions. He asks us to strike the fees and fine unless the matter is remanded for an explicit determination of his ability to pay.

The People acknowledge the holding in *Dueñas* and contend that if we determine that any due process violation occurred "by the trial court failing to hold an ability to pay hearing before imposing those non-punitive assessments, [($240 conviction fee under Gov. Code, § 70373 and $320 court operations fee under Pen. Code, § 1465.8)], that violation can be remedied by [defendant] requesting an ability to pay hearing at" resentencing on the enhancements. As to the $10,000 restitution fine, the People assert the fine is "a form of punishment, and should principally be examined in light of the excessive fines clause, under which ability to pay is not determinative."[12]

[12] "It makes no difference whether we examine the issue as an excessive fine or a violation of due process." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728 [considering an excessive fine challenge to the civil penalty imposed under Health & Saf. Code, § 118950, subd. (d)]; see *People v. Castellano* (2019) 33 Cal.App.5th 485, 490 ["imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections"].)

We note that the trial court never conducted a hearing on defendant's ability to pay any fees or fine despite defense counsel raising the issue. Since we are remanding the matter for resentencing, the trial court is directed to conduct an ability to pay hearing.

1. Further background information.

The record contains very limited information about defendant and his financial circumstances. According to the probation officer's report, at the time of his sentencing, defendant was 24 years old, six feet three inches tall, and weighed 135 pounds. There is no information relevant to his financial assets, liabilities, skills, previous employment, and physical or mental impairment. Nonetheless, the report recommended the trial court order defendant to pay $16,675 (plus interest) in victim restitution (Pen. Code, §§ 1202.4, subd. (f),(3)(G), 2085.5), a $10,000 restitution fine (Pen. Code, §§ 1202.4, 2085.5), a $240 conviction fee (Gov. Code, § 70373), and a $320 court operations fee (Pen. Code, § 1465.8, subd. (a)(1)). At the sentencing hearing, the court ordered defendant to pay the recommended amounts, with the exception of the victim restitution, which the court imposed in the amount of $5,000 and reserved jurisdiction as to "any other actual restitution to the victim's family." Regarding the restitution fine of $10,000, defense counsel argued for the imposition of the minimum amount based on defendant's ability to pay: "Being an LWOP inmate, he's not going to have the opportunity to work off any fines or fees. . . . [¶] . . . [¶] It's . . . based on the ability to pay, and obviously he's not going to have a salary." The court did not comment on defendant's ability to pay.

2. Applicable law.

The *Dueñas* court concluded: "[T]he assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed without a determination that the defendant is able to pay, are . . . fundamentally unfair; imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution." (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1168; accord, *People v. Belloso* (2019) 42 Cal.App.5th 647, 654-655 (*Belloso*).)[13] In contrast to court assessments, a restitution fine under Penal Code section 1202.4, subdivision (b), "is intended to be, and is recognized as, additional punishment for a crime." (*Dueñas*, at p. 1169; accord, *Belloso*, at p. 655.) Penal Code section 1202.4, subdivision (c), expressly provides a defendant's inability to pay a restitution fine may not be considered as a "compelling and extraordinary reason" not to impose the statutory minimum fine. However, to avoid the serious constitutional questions raised by imposition of such a fine on an indigent defendant, "although the trial court is required by Penal Code section 1202.4 to impose a restitution fine, the court must stay the execution of the fine until and unless the People

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[13] Several Courts of Appeal, including this court (*People v. Jones* (2019) 36 Cal.App.5th 1028, 1030-1035) have applied the analysis in *Dueñas* (e.g., *People v. Santos* (2019) 38 Cal.App.5th 923, 929-934; *People v. Kopp* (2019) 38 Cal.App.5th 47, 95-96, review granted Nov. 13, 2019, S257844 [applying due process analysis to court assessments]). Others have rejected the due process analysis (e.g., *People v. Kingston* (2019) 41 Cal.App.5th 272, 279-281; *People v. Hicks* (2019) 40 Cal.App.5th 320, 326, review granted Nov. 26, 2019, S258946), or concluded the imposition of fines and fees should be analyzed under the excessive fines clause of the Eighth Amendment (e.g., *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1061; *People v. Kopp*, at pp. 96-97 [applying excessive fines analysis to restitution fines]).

demonstrate that the defendant has the ability to pay the fine." (*Dueñas*, at p. 1172; accord, *Belloso*, at p. 655.)

Here, while the probation report indicates defendant "waived his interview with Probation," it is unclear whether he was unwilling to provide information regarding his ability to pay any fees and fines. At sentencing, defense counsel voiced defendant's inability to pay the restitution fine. We conclude defense counsel's statement amounted to an objection on ability to pay grounds; however, the record is silent on the trial court's determination that defendant had the ability to pay. Although the court's determination of this issue may be implied, it must be supported by substantial evidence. (See *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1398, disapproved on other grounds in *People v. McCullough* (2013) 56 Cal.4th 589, 599, and further disapproved in *People v. Trujillo* (2015) 60 Cal.4th 850, 858, fn. 5; see also *People v. Nilsen* (1988) 199 Cal.App.3d 344, 347.) On this record, there is no evidence. Since, defendant's case is being remanded for sentencing, the trial court is directed to conduct an ability to pay hearing.

H. The Abstract of Judgment Must Be Modified.

Defendant contends, and the People concede, the abstract of judgment incorrectly indicates the trial court imposed a $10,000 parole revocation fine under section 1202.45. The trial court never imposed a parole revocation fine because defendant is not eligible for parole. We agree with the parties and will direct the trial court to correct the abstract of judgment to accurately reflect the court's actual order.

III. DISPOSITION

The matter is remanded to allow the trial court to: (1) exercise its discretion under section 12022.53, subdivision (h), to determine whether to strike or dismiss the firearm enhancements in counts 1, and 3 through 7; (2) exercise its discretion under sections 667, subdivision (a), and 1385, subdivision (b), as amended by Senate Bill No. 1393 effective January 1, 2019, to determine whether to strike or dismiss defendant's prior serious felony conviction; and (3) conduct an ability to pay hearing on the fees and fine specified above. The trial court shall resentence defendant accordingly.

The superior court clerk is directed to amend the abstract of judgment to reflect the outcome of defendant's resentencing, to delete the $10,000 parole revocation fine (§ 1202.45), and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

FIELDS
J.